Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

JOSEPH N. WEBER, as President of the American Federation of Musicians, and GEORGE E. BROWNE, as President of International Alliance of Theatrical Stage Employees & Moving Picture Operators of the United States and Canada,

Petitioners,

—against—

OPERA ON TOUR, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions of the Courts Below:

The opinion of the Supreme Court at Special Term, New York County, is reported in 170 Misc. 272. The opinion of the Appellate Division is reported in 258 App. Div. 516. The opinion of the New York Court of Appeals is reported in 285 N. Y. 348.

Jurisdiction.

The jurisdictional basis for the petition and statement of the case are stated in the petition, and for the sake of brevity, are not repeated here.

The Federal Questions Presented.

Those of immense importance not alone to labor but to the general public are:

1) Does the injunction restraining unions from striking—refusing to work—in protest against the introduction of mechanical devices which displace labor, violate the constitutional guarantee of freedom of speech and assembly, and equal protection of the laws?

2) Does the injunction by its unlimited scope infringe the constitutional guarantee of free speech and assembly?

Specification of Errors.

1) The New York Court of Appeals erred in granting a permanent injunction restraining respondents from striking—refusing to work—which injunction violates the freedom of speech, assembly and equal protection of the laws guaranteed by the XIVth Amendment to the Constitution of the United States.

2) The New York Court of Appeals erred in granting a permanent injunction which is so sweeping that it infringes upon petitioners' freedom of speech and assembly in violation of the XIVth Amendment to the Constitution of the United States.

ARGUMENT

I.

The injunction violates the constitutional guarantee of freedom of speech and assembly.

Chief Judge Lehman points out in his dissenting opinion (285 N. Y. 348):

(a) That the courts have no right to intrude into the field of conflicting economic policy (pp. 366-368);

(b) That the acts of petitioners were all in good faith, without malice or ill-will, without fraud, force, coercion or intimidation of any kind, in the honest belief that such actions were necessary for the protection of the employment opportunities of their members, in furtherance of their economic interests (p. 365);

(c) That this is an injunction against a strike and nothing else (p. 364);

(d) "Why there is no labor dispute here remains a mystery to me" (p. 374).

The prevailing opinion (p. 357) cites and follows *Wohl* v. *Bakery & Pastry Drivers Union*, 284 N. Y. 788, as a "case just unanimously decided", involving "coercion" and an "unlawful labor objective" where a permanent injunction was affirmed, without opinion. This court's reversal of the *Wohl* case applies here because the principles and the issues are the same. There the unions threatened to picket manufacturers and customers of the plaintiffs (peddlers) unless they employed a union member one day a week to assist

them. This was a protest by the union aimed at lessening unemployment among union members. In the case at bar, the protest of the union was aimed at the introduction of mechanical devices which would increase unemployment among union members. In both cases, the New York Court described the acts of the unions as "coercion"; in both cases it described the objective as "unlawful", and in both cases issued injunctions. When the *Wohl* case was brought to this Court, the attention of this Court was called to the decision of the New York Court of Appeals in the instant case to indicate the importance of the issue involved and the evident purpose of the New York Court to outlaw, by labor injunction, strikes which did not agree with that court's economic ideas. The injunction in the *Wohl* case was dissolved by this court, and the same fate should be meted out to the injunction in the case at bar.

Court adjudications of conflicting considerations of economic policy would mean judicial censorship (*Near* v. *Minnesota*, 283 U. S., 697, 716). That would mean complete eradication of free speech and complete usurpation by the courts of legislative functions.

The provisions of this injunction show on its face, that the unions' rights and freedom of speech were actually litigated; otherwise, there would not have been such sweeping provisions.

In the *Hutcheson* case (*supra*), Mr. Justice Frankfurter restates the policy that allowable areas of economic policy are not to be restricted, and says (312 U. S. 219, at pp. 232, 233):

> "So long as a union acts in its self interest and does not combine with non-labor groups, the licit and illicit under section 20 (Clayton Act) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness

or unselfishness of the end of which the particular union activities are the means."

* * * * *

"The refusal of the carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions to similarly refuse to work, are plainly then the free scope accorded to workers by Section 20 for 'terminating any relation of employment' or 'ceasing to perform any work or labor' or 'recommending, advising or persuading others by peaceful means so to do'."

In the *Swing* case (*supra*), Mr. Justice Frankfurter (p. 325) says:

"Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye (*Herndon* v. *Lowry*, 301 U. S. 242, 258; *Schneider* v. *State*, 308 U. S. 147, 161; *U. S.* v. *Carolene Products Company*, 304 U. S. 144, 152n) it would be improper to dispose of the case otherwise than on the face of the decree which is the judgment now under review."

* * * * *

"Such a ban of free communication is inconsistent with the guarantee of freedom of speech * * *. A State cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and work-

> ers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. The right of free communication cannot therefore be mutilated by denying it to workers in a dispute with an employer, even though they are not in his employ * * * Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. Senn v. Tile Layers' Union, 301 U. S. 468, 478."

In *Senn* v. *Tile Layers' Union,* 301 U. S. 468, this Court said at page 482:

> "Each member of the union, as well as Senn has the right to strive to earn his living. Senn seeks to do so through the exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent on securing work; and securing work is dependent upon public favor. To earn the patronage of the public, each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute picketing and truthful publicity are means legal for unions."

The New York Court of Appeals has held that the economic interests concerned justify the injunction. This is directly contrary to the decision in the *Swing* case—a decision foreshadowed by this Court's ruling in *Milkwagon's Drivers Union etc.* v. *Meadow Moor Dairies, Inc.,* 312 U. S. 287, which Judge Lehman called to the attention of the New York Court in his dissenting opinion (285 N. Y. at p. 375). The language used by this Court in the *Swing* case is applicable here:

> "The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."

The fact that the majority of the New York Court refused to admit that the right to strike was involved, and that the strike grew out of a legitimate labor dispute, does not prevent this Court from recognizing the obvious—that the right to strike was directly involved, and that prohibiting the strike just as directly involved the guarantees of the Fourteenth Amendment.

A labor dispute exists whether the complaint be one of hours, wages, or elimination of labor by mechanical devices; just as a labor dispute would exist if employers combined to shut down all factories, or if technological improvements made it possible to displace almost all labor. Being shut out of work entirely is surely a more important grievance than the mere question of rate of wages. It is the most important kind of labor dispute there could be. The fact that the New York Court refused to recognize the grievance in this case as a labor dispute, does not rule it out of the case. If the Court of Appeals eliminated the Federal question from consideration, that does not bar this petition for certiorari, where it is so evident that the Federal question was the only question passed upon and decided.

Atlantic, etc., R. R. Co. v. *Mims,* 242 U. S. 532, 535.

There is nothing in this record to dispel the presumption that petitioners did not intend to waive their constitutional rights.

Norris v. *Alabama,* 294 U. S. 587.

II.

The judgment in this case is in direct conflict with the latest adjudications of this Court.

To sustain the injunction in this case would be to permit the gradual whittling away of the effect of the decisions of this Court in the line of cases which culminated in the *Swing* decision:

> *Senn* v. *Tile Layers Union,* 301 U. S. 468, 478;
> *Thornhill* v. *Alabama,* 310 U. S. 88;
> *Carlson* v. *California,* 310 U. S. 106;
> *Milk Wagon Drivers Union* v. *Meadow Moor Dairies, Inc.,* 312 U. S. 287.

It is quite evident that, if the decision of this Court in *Bakery & Pastry Drivers* v. *Wohl* had been handed down before the Court of Appeals rendered its decision in the case at bar, the result would have been different, and this petition would have been unnecessary. The *Wohl* case was decided by the New York Court of Appeals on December 31, 1940, and its decision in the present case was made on April 24, 1941.

III.

The Federal question was the only question involved and was necessarily passed upon by the Court of Appeals.

The Federal question involved here is not complicated by any local question which would independently sustain the injunction. One question raised at the trial and on appeal by petitioners, was the application of Sec. 876-a of the New York Civil Practice Act, which the Court

of Appeals said did not apply because, it claimed, no labor dispute existed. The labor objective was eliminated as invalid, even though the Court of Appeals at the same time sustained the right of refusal to work because of the use of machinery, or for any other reason—a right which is sustained by authority.

Bayer v. *Brotherhood of Painters,* 108 N. J. Eq. 257;
Rutan v. *Local Union,* 97 N. J. Eq. 77;
Wilson-Adams Co. v. *Pearce,* 264 N. Y. 521, aff'g. 240 App. Div. 718;
Nat. Prot. Ass'n v. *Cumming,* 170 N. Y. 315, 320.

Thus the only question left for the Court of Appeals to consider or pass upon, as its decision discloses, was the Federal question which requires a reversal of that Court's decision.

IV.

The blanket injunction violates the Fourteenth Amendment.

Even if we assume that the petitioners had no lawful right to strike to accomplish their declared objective, the terms of the injunction not only prohibit the strike itself, but effectively shut the mouths of all members of both unions involved. They dare not even whisper the subject of their grievance. Note the sweeping and blanket provisions of this injunction (R. 26).

It permanently restrains the officers, employees, agents and attorneys of both petitioner-unions from interfering with respondent's employees, and from directing or advising any person to cease performing, or not to perform, for respondent; from inducing, by any means, any person affiliated with any groups of respondent's employees to leave, or refuse to enter, respondent's employment, on the ground that respondent is using recorded music in its theatrical produc-

tions; both unions being directed forthwith to cancel any communication of any sort to any person, bearing on this subject, and to notify all persons affected by any notices, resolutions, etc., to the effect that all such notices, resolutions, etc., were cancelled.

No more effective method of outlawing free speech could be devised than the terms of this injunction. No attempt was made by the Court to separate the acts which the unions could perform from those which would be unlawful. Everything was unlawful. The subject of the introduction of mechanical devices which displace labor must not even be mentioned. The constitutional guarantee of freedom of speech and assembly was clearly violated.

CONCLUSION.

The Court of Appeals decision in this case has already excited widespread comment and inquiry. It will undoubtedly be frequently cited, in opinions throughout the country, for the proposition that the courts are the sole arbiters of the justification for labor disputes, the sole authority to which labor may look for permission to speak its mind on its grievances.

It is respectfully submitted that the rule which petitioners ask this Court to enunciate in the present case, is required as a natural and logical outgrowth of this Court's decision in the *Swing* case; otherwise, the various state courts may create chaos and stamp out freedom of speech by injunctions issued for no other reason than that an objective was sought which conflicted with an individual court's economic ideas.

The writ of certiorari requested by petitioners should be granted, the judgment of the Court of Appeals of the State of New York should be reviewed by this Court, and said judgment reversed.

Respectfully submitted,

WILLIAM MACY,
Attorney for Petitioners.